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NO.____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JOHN R. DEVITO,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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QUESTIONS PRESENTED

1. Is the mandatory maximum life sentence set forth in Section 70.00(2)(a) of the Penal Law of the State of New York imposed upon petitioner after trial for the sale of methamphetamine unconstitutional on the ground that it is grossly disproportionate to the sentence he would have received had he pleaded guilty to a lesser felony?

2. Was the trial court's curtailment of defense counsel's attempts to question the key prosecution witness on the scope of punishment she faced under the indictment a violation of due process of law?

3. Did the trial court's remonstration with defence counsel impinge upon his credibility in the eyes of the jury to the level of denying petitioner effective assistance of counsel?

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IN THE
SUPREME COURT OF THE UNITED STATES
No.
October Term, 1982

JOHN R. DEVITO,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To The Honorable Chief Justice and the Associate Justices of The Supreme Court of The United States

Your petitioner, John R. DeVito, prays that a writ of certiorari issue to review an order, entered on June 8, 1982, of the Court of Appeals of the State of New York, which affirmed an order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, which affirmed a judgment of the Supreme Court of the State of New York, County of Suffolk, convicting petitioner of criminal sale of a controlled substance in the second degree and conspiracy in the first degree and imposing an indeterminate sentence of imprisonment which has a maximum term of the petitioner's natural life and a minimum period of imprisonment of three years.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals of the State of New York is reported in 56 N.Y.2d 846, and a copy of same is annexed hereto as Appendix A.

The judgment of conviction was entered on March 20, 1980, and a copy of same is annexed hereto as Appendix B. The affirmance of the conviction by the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, is reported in 81 A.D.2d 1045, and leave to appeal to the Court of Appeals of the State of New York is reported in 54 N.Y.2d 836.

STATEMENT OF JURISDICTION

The statutory provision believed to confer jurisdiction on this Court to review the order in question is 28 U.S.C. No. 1257(3). Petitioner also claims that the mandatory maximum term of life imprisonment under the circumstances herein contravenes the "cruel and unusual punishments" provision of the Eighth Amendment to the United States Constitution, that he was deprived of the right to "Assistance of Counsel" as provided in the Sixth Amendment when the trial court remonstrated with defense counsel and that his right to "due process of law" as stated in the Fourteenth Amendment was violated when the trial court curtailed cross-examination of the key prosecution witness.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution:

Amendment VI

"In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence."

Amendment VIII

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Amendment XIV

"Section 1 . . . No State shall . . . deprive any person of . . . liberty . . . without due process of law . . ."

New York State Penal Law, Section 220.41:

"A person is guilty of criminal sale of controlled substance in the second degree when he knowingly and unlawfully sells:

2. one or more preparations . . . or substances of an aggregate weight of one-half ounce or more containing methamphetamine . . .

Criminal sale of a controlled substance in the second degree is a class A-II felony."

New York State Penal Law, Section 70.00:

"1. Indeterminate sentence . . . a sentence of imprisonment for a felony shall be an indeterminate sentence. When such a sentence is imposed, the court shall impose a maximum term in accordance with the provisions of subdivision two of this section . . .

2. Maximum term of sentence. The maximum term of an indeterminate sentence shall be at least three

years and the term shall be fixed as follows:

(a) For a class A felony, the term shall be life imprisonment. . ."

STATEMENT OF THE CASE

The original indictment contained the names of four other co-defendants, to wit, Salvatore Abbate, Joseph F. Cavallo, Jacqueline DiLauro and Stephen J. DiLauro. The indictment against Jacqueline DiLauro was dismissed voluntarily and she then testified as a witness for the prosecution. The other co-defendants as a result of Plea Bargaining obtained indeterminate sentences with maximum three year terms.

These four co-defendants were wheeling and dealing in drug sales and use under the leadership of Stephen J. DiLauro.

Between August 1st and August 18th, 1978, they became ensnared by undercover detectives who made several purchases of drugs from DiLauro. This activity culminated in a sale of eight ounces of methamphetamine for $8,000 on August 18, 1978.

The prosecution claimed that this was all done to a conspiracy operating between August 1st and the 18th. However, DeVito's first conversation with any co-defendant did not take place until on or about August 15th.

The trial record is bare of any direct evidence to show that petitioner knew that an unlawful sale of methamphetamine had been or was to be made. DiLauro made the sale to the undercover agent. Petitioner was not present at the sale. It is this sale which is the basis of petitioner's conviction.

Eleven separate crimes were charged in the indictment. However, nine counts were ultimately dismissed by the trial court. It is submitted that the court

followed an unusual pattern in dismissing these nine counts.

On March 5, 1979, the court upon deciding a co-defendant's omnibus motion, dismissed Counts Two, Three, Four and Five against DeVito on its own motion on the ground of insufficient evidence before the Grand Jury.

Subsequently, when petitioner made his own omnibus motion, the court on March 12, 1980, dismissed Counts Eight and Nine also on the ground of insufficient evidence before the Grand Jury.

Then at the end of the people's case on trial, the court upon petitioner's motion dismissed Counts Six and Seven.

Finally before submitting the case to the jury, the court withheld Count Eleven from the jury.

The foregoing pattern is most unusual and can be explained only as evidencing a marked degree of indecisiveness on the part of the court. As a result it is respectfully submitted that the court should have dismissed the remaining two counts.

REASONS FOR GRANTING THE WRIT

I. THE SENTENCING REQUIREMENT OF A MANDATORY MAXIMUM LIFE SENTENCE IS UNCONSTITUTIONAL AS APPLIED TO THE FACTS HEREIN

Although the constitutionality of the severe sentencing prescriptions of Article 220 (controlled substances offenses) of the Penal Law of the State of New York have been upheld, it is petitioner's contention that the mandatory life sentence as applied to the individual facts of this case.

It is respectfully submitted that the legislative fiat does not preclude such examination of and attack upon the facts of a particular case. See *Leary v. United States*, 395 U.S. 6. Furthermore the courts of the State of New York have already sustained such attack upon the constitutionality of a sentence to be imposed in such a situation. *People v. Askew*, 93 Misc. 2d 754, affirmed 66 A.D.2d 710.

This Court has consistently examined the sentencing function in determining the constitutionality of "harsh" sentencing requirements. See *Furman v. Georgia*, 408 U.S. 238, *Leary v. United States*, supra, and *United States v. Ganey*, 380 U.S. 63.

Herein, the co-defendants were permitted to plea bargain down to a lesser felony and, thus, received indeterminate prison sentences with three year maximums. Petitioner refused to plea bargain and received a maximum life sentence. The disparity between three years and life is grossly disparate and, thus, unconstitutional as being "cruel and unusual" under the Eighth Amendment.

It is elemental that a person who protests his innocence should go to trial and not be "compelled" to plead guilty. *People v. Selikoff*, 35 N.Y.2d 227 and *People v. Lederhilger*, 41 A.D.2d 569. The "harsh" sentencing requirement should not be utilized to encourage confessions and guilty pleas as provided for in the plea bargaining process. As applied herein petitioner has been unduly penalized for exercising his right to go to trial.

Herein, the life sentence was mandated simply because petitioner exercised his constitutional right to go to trial and lost. His co-defendants avoided such "harsh" result and received the light three year maximums simply by taking the bait tendered through the plea bargain. The plea in effect was a choice between a

light three year maximum or trial plus mandatory life. Taking the three yeer alternative is not truly a voluntary choice. See *Tollet v. Henderson*, 411 U.S. 258. The scenario as presented chills the free exercise of the trial experience. See *United States v. Jackson*, 390 U.S. 570.

In view of the pleas taken by and sentences imposed upon the co-defendants, petitioner should not have been placed in the position finally "imposed" upon him. His life sentence should now be vacated under the special facts in this case.

This disparity of punishment between co-defendants who have plea bargained as against the one who exercised his right to go to trial has never been examined by this Court for constitutional infirmity. It is respectfully submitted that the issue is sufficiently important for certiorari to be granted.

II. DUE PROCESS WAS VIOLATED WHEN THE TRIAL COURT PREVENTED DEFENSE COUNSEL'S ATTEMPTS TO QUESTION JACQUELINE DILAURO ON THE SCOPE OF PUNISHMENT SHE FACED UNDER THE INDICTMENT

The prosecution presented Jacqueline DiLauro as the sole lay witness against petitioner. Since she was a co-defendant on the same indictment and faced identical, serious charges, it was of great significance to learn that after her initial arrest she never spent a day in custody and that the indictment against her was dismissed voluntarily by the prosecution.

Under such circumstances petitioner's attorney sought to show through cross-examination that Jacqueline DiLauro's motive to lie was increased because of the sentence she faced before she agreed to testify and obtain a dismissal of her indictment. At that juncture the quintessence of cross-examination obviously would be the attrition of the witness' credibility by means of graphic impeachment.

At the very outset of cross-examination counsel carefully undertook such endeavor. His questioning began as follows:

> "Q. Mrs. DiLauro, I direct your attention back to the evening of August 15th-18th, 1978 when the police came and raided the house. You were arrested at that time were you not?
>
> A. Yes.
>
> Q. I assume—were you scared? Were you frightened at that time?
>
> A. Very.
>
> Q. Were you afraid you might *go to jail* as a result of that arrest) (emphasis added)
>
> A. Yes."

After establishing the witness' fear of incarceration, counsel left that area but subsequently returned to the scope of the *jail* sentence faced by the witness at the time of her arrest with the following question:

> "Q. Are you aware of the fact that the law punishes that crime by a lifetime maximum prison sentence?"

The prosecutor objected but instead of overruling (or sustaining) the objection, the trial court embarked upon the following extraordinary peroration to the jury:

> "THE COURT: Members of the jury, that comment, incidentally, was improper—and because of that you may be seated while I explain the matter to the jury."

Thus, instead of following the normal procedure of either simply sustaining or overruling the objection, the Court prejudiced counsel's question by calling it a "comment" which "was improper." From that ill-founded beginning the court continued in a manner which compounded the prejudicial material beyond salvation as can be noted from the following:

> "THE COURT: Please be seated. The first principle that I indicated to you is that the matters of sentence or punishment are never to be considered by the jury in determining whether a person is guilty or innocent of a particular crime. As a matter of law the jury may not consider it.
>
> Secondly, the impression that may have been gained from the question which has been asked needs some explanation. The law provides for indeterminate sentences with amounts fixed depending on the

nature of the crime and maximum terms which can be indeterminate even to the point of life. This does not mean that a person has to serve that time. After the minimum sentence has been fixed, the Parole Board decides when a defendant may go out. Not only that, either with respect to the most serious of the crimes here, the Court has the power to impose a different sentence, re-sentence, which does not contain a lifetime sentence.

So, I do not want you to be impressed by the question and believe that any person found guilty automatically is put to jail for life. That's not necessarily so.

As a matter of fact, it's unlikely that any such person who behaves while incarcerated would ever serve anything like that.

Now, I tell you that your question was improper and I am saying to you in front of the jury. It's designed to create sympathy and the wrong impression.

Now, you may proceed."

Although the court did not specifically sustain the objection to counsel's question, it is quite evident that the court deemed it to be objectionable. It is respectfully submitted that the question was proper and that the objection should have been overruled without fanfare. Furthermore, it is also respectfully claimed that the manner in which the court *overruled* the objection created prejudicial error.

The court on this prejudicial peroration to the jury made five serious errors. It first stated that sentence and punishment were not matters to be considered by the jury in its deliberations. While such admonition is a correct statement of law, in this situation it created the impression that counsel improperly was seeking to elicit matters of sentence to be imposed upon defendant. This, of course, was not true as clearly stated at that time by counsel as follows:

"MR. BOGATIN: It was designed to show—to impeach the credibility of this witness."

Secondly, it sought to explain the nature of an indeterminate sentence with a maximum term of life imprisonment. The court then said that "does not mean that a person has to serve that time," because the "Parole Board decides when a defendant may go out." In effect the court was telling the jury there is no such thing as a life sentence, and even if there was, the Parole Board would release the prisoner soon enough. In this connection the court also stated it had the power to resentence and thus "impose a different sentence . . . which does not contain a lifetime sentence."

This last message to the jury was a gross distortion of the court's re-sentencing authority. Herein, petitioner was charged with a class A-II felony. Conviction thereof requires a *mandatory* maximum term of *life imprisonment*. (Penal Law No. 70.00) The Court's assurance to the contrary, on this point alone was a violation of due process.

Likewise, the court's assurances to the jury that the petitioner would not be required to serve a life sentence, that he would not automatically be sentenced to life imprisonment and that he would never "serve anything like that" were all unwarranted.

It is respectfully submitted that the scope of a prison sentence facing a prosecution witness is a proper area for cross-examination when impeachment is the goal of such inquiry. Confrontation under such circumstances is an important element of cross-examination. See *Davis v. Alaska*, 415 U.S. 308, and *People v. Roth*, 30 N.Y.2d 99.

The recent case of *People v. Bryant*, 77 A.D.2d 603, presents a complete analogue to the case at bar.

Therein, the defendant was convicted of criminal sale of a controlled substance in the second degree after trial by jury.

"On cross-examination defense counsel's attempts to question the informant on the scope of punishment she faced *** were frustrated when the trial court, sua sponte, ruled that such questioning was improper." (page 102 of Supplement) The trial "court ruled that cross-examination into this area would cause the jury to think in terms of punishment." (ibid)

This Court in reversing the conviction characterized the lower court's rationale as follows (ibid):

> "This was error. Cross-examination is an essential component of the right of an accused in a criminal prosecution to confront the witnesses against him (*Davis v. Alaska*, 415 U.S. 308, 315-316, 94 S. Ct. 1105, 1109-1110, 39 L.Ed. 2d 347; cf. *People v. Roth*, 30 N.Y. 2d 99, 102, 281 N.E.2d 174). On the record before us, defendant was entitled to attempt to show through cross-examination that the informant's motive to lie was increased because of the sentence she faced before she agreed to become an informant and to plead guilty and receive a sentence of probation (see *People v. Tyler*, 54 A.D.2d 723).

It is respectfully submitted that petitioner was denied due process when the trial court prevented this cross-examination of Jacqueline DiLauro.

III. THE TRIAL COURT DEPRIVED PETITIONER OF ASSISTANCE OF COUNSEL WHEN IT REMONSTRATED WITH DEFENSE COUNSEL

It is respectfully submitted that the trial court deprived petitioner of effective assistance of counsel within meaning of the Sixth Amendment when it remonstrated with defense counsel during the cross-examination of Jacqueline DiLauro.

The court repeated over and over that counsel's questioning was improper and "in violation of all of the rules." The court's utterance that counsel was not acting like a lawyer most certainly must have had a derogatory affect upon the jury's view of his standing and credibility. Furthermore, the court's exhortation in the absence of the jury that counsel was "bordering upon contempt" and that his conduct was "completely unjustified" had a chilling effect to such extent that petitioner was deprived of effective cross-examination. See *United States v. Kastenbaum*, 613 F.2d 86 (1980).

This prejudicial attitude began upon the prosecutor's first objection to the question as to scope of punishment faced by his witness when the court in lieu of overruling (or sustaining) the objection, stated as follows and as previously set forth:

> "THE COURT: Members of the jury, that comment, incidentally, was improper and because of that you may be seated while I explain the matter to the jury."

Upon completing its prejudicial peroration the court then remonstrated with defense counsel in the presence of the jury for availing himself of the right to impeach the prosecution's chief witness. This came

about when the court turned from the jury and addressed counsel as follows:

> "Now, I tell you that your question was improper and I am saying to you *in front of the jury.* It's designed to create sympathy and the wrong impression." (emphasis added)

When counsel sought to explain that he was merely seeking to impeach the witness by proper cross-examination, the court further sought to demean those efforts as follows:

> "MR. BOGATIN: It was designed to show—to impeach the credibility of this witness.
>
> THE COURT: No, it wasn't. There is no point in my categorizing it. I am sure that you know how I feel.
>
> MR. BOGATIN: I am sure you know how I feel. I am defending a client in a very serious case.
>
> THE COURT: You have an obligation to act as a lawyer.
>
> MR. BOGATIN: I am trying in every sense of the word.
>
> THE COURT: Let's not argue in front of the jury. Your question is improper and in violation of all of the rules. Go ahead.
>
> MR. BOGATIN: On cross-examination, Judge?
>
> THE COURT: On anything and you know that. You are a man of considerable experience.
>
> MR. BOGATIN: Well, we differ, Judge. And I will certainly abide by your ruling."

Upon resumption of cross-examination counsel continued as follows:

> "Q. You told us before that you were afraid that you might go to jail, right?
>
> A. Yes.

Q. Did you have any knowledge of what type of imprisonment you might be facing?
A. Not at the time, I didn't.
Q. Did there come a time when you did learn—"

At that instant the court, on its own volition and without the prosecutor interposing an objection to the question, interrupted the cross-examination with the following:

"THE COURT: I said that you are going to stay away from that area. Sir, I am going to excuse the jury."

Although counsel indicated he was not going to ask the same question as previously, the court still excused the jury and castigated counsel as follows:

"THE COURT: Sir, your conduct is bordering upon contempt. You absolutely are invading an area that you as an experienced lawyer know you should not invade. Notwithstanding the instructions to you and in front of the jury you persist in it.
Now, I say that your conduct is contemptuous. I say that—and completely unjustified. I can't put it in any stronger language.
Let's take a recess."

Although counsel again sought to explain that he was properly attempting to impeach the witness' credibility, the court refused to recognize that and concluded as follows:

"THE COURT: Sir, I have been on the bench much long enough to know some of the curves that the lawyers throw. Frankly, your conduct is completely unjustified and not excused by any rational approach to cross-examination."

In *People v. Rodriquez*, 32 A.D.2d 545, the State court did not hesitate to reserve a conviction in a similar situation wherein it held as follows:

> "The trial court also erred in remonstrating with defense counsel, in the presence of the jury, for availing himself of the right to make an objection . . ."

The federal courts have consistently held that when comments of the trial judge exceed the boundaries of fair discipline by official disparagement of counsel, error exists. See *United States v. Porter*, 441 F.2d 1204, certiorari denied *Harrison v. United States*, 404 U.S. 911, and *Newland v. United States*, 404 U.S. 911, and *Schaefer v. United States*, 404 U.S. 911; *United States v. Pellegrino*, 470 F.2d 1205, certiorari denied 411 U.S. 918, *United States v. Nowak*, 448 F.2d 134, certiorari denied 404 U.S. 1039, and *United States v. Guglielmini*, 384 F.2d 602, appeal after remand 425 F.2d 439, certiorari denied 400 U.S. 820.

CONCLUSION

Upon the foregoing this Court should grant the writ so that the conviction of petitioner may be set aside on constitutional grounds.

Respectfully submitted,

MURRAY BOGATIN